Filed 7/13/15 Madow v. Post Construction Services CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JAMES S. MADOW, Plaintiff and Appellant, v. POST CONSTRUCTION SERVICES, LP et al., Defendants and Respondents.	A139254 (City & County of San Francisco Super. Ct. Consolidated Nos. CGC-11-508188, CGC-11-508589, CGC-11-515621)

I. INTRODUCTION

James S. Madow, an attorney, sued his client after making an investment loan of $325,000 in the client's business. Initially, Madow sought to rescind the loan. However, after the client twice-accepted the rescission, Madow amended his complaint, removing his demand for rescission. In response, the client asserted rescission as an affirmative defense and also cross-complained for mutual rescission. Following a bench trial, the court found in favor of the client, finding that the rescission demand had been accepted before Madow withdrew his demand. On appeal, Madow does not challenge the ruling that the investment loan had been rescinded. Rather, he asserts that the trial court erred in denying him the right to present his unclean hands defense and his theory of alter ego liability at trial. He further claims that the judgment entered is inconsistent with the terms of the settlement agreement that the parties entered into after the court heard the rescission claim. We affirm.

II. BACKGROUND

A. The Parties and The Loan

Madow represented George V. Cresson, III (Cresson) and numerous entities affiliated with Cresson for many years, including Post Construction Services, LP (PSC).

In October 2009, Madow made a $325,000 investment loan to PCS. The loan was secured by five personal property interests. Two of the security interests were limited partnership interests held by PCS in Loanvest XII, LP and Loanvest XIII, LP (collectively Loanvest).[1] South Bay Real Estate Commerce Group, LLC (South Bay) is the managing partner of Loanvest. South San Francisco I, LLC (SSF) is, in turn, the managing partner of South Bay. Cresson is the manager of both SSF and South Bay.

Pursuant to the terms of the accompanying promissory note, payment in full was due 90 days after written notice by Madow.

B. Commencement of Litigation

On October 31, 2010, while representing Cresson in an unrelated matter, Madow expressed his frustration with the predicament he faced on the "eve of trial." Madow advised Cresson that he owed Madow "tens of thousands of dollars" for "experts, research attorneys, and legal service providers," as well as "tens of thousands of dollars in fees and costs reimbursements." As a consequence of Cresson's inability to perform, Madow exercised his "90-day call right" to receive payment in full of the $325,000 loan to PCS.

Following nonpayment of the loan, Madow sued Cresson, PCS, South Bay, SSF, and Loanvest for numerous causes of action. In the third amended complaint, filed on June 19, 2012, Madow alleged causes of action for: 1) breach of promissory note; 2) money lent; 3) money had and received; 4) foreclosure of security interest; 5) fraud; 6) rescission; 7) breach of fiduciary duty; and 8) intentional impairment of security interest. Madow also sought declaratory relief and requested an accounting of Loanvest.

---

[1] Madow also purchased an interest in Loanvest in the amount of $475,000. That investment is not at issue in the instant appeal.

The gist of Madow's claims was that PCS served as the "personal holding company" for Cresson. Madow claimed that PCS and SSF were "sham entities, lack[ing] proper capitalization, fail[ing] to comply with partnership or limited liability company formalities . . . and are mere shells, instrumentalities, and conduits conceived, intended, and used by Cresson for the purpose of insulating himself from personal liability and substituting in his place financially insolvent or financially irresponsible entities." Madow further alleged that PCS and SSF were "so dominated and controlled by Cresson that there is such a unity of ownership and interest between PCS and SSF[] on the one hand, and Cresson, on the other hand, that any separateness between them has ceased to exist, making Cresson the alter ego of both PCS and SSF[] for purposes of liability herein." (Italics omitted.)

In his tenth cause of action for rescission against Cresson, PCS, and SSF, Madow alleged he and PCS entered into the loan agreement "under a material mistake of fact within the meaning of [ ] Civil Code § 1577 regarding the principal amount of the loan asset held by Loanvest XIII." According to Madow, the loan was inadequately secured and, as such, his consent was procured by mistake, which could be properly rescinded pursuant to Civil Code sections 1565, 1567, and 1577.

On June 20, 2012, the day after Madow filed the third amended complaint, Devin Courteau, the attorney representing Cresson, PCS and SSF, accepted the rescission demand. Courteau signed the letter on behalf of PCS and Cresson, who was identified as the manager of South Bay. In this letter, Courteau mistakenly referred to South Bay as the general partner of PCS. Noticing the mistake, Courteau sent a second acceptance letter on June 21, 2012, identical in all respects, except correctly identifying SSF as the general partner of PCS.

On February 5, 2013, Madow filed a fifth amended complaint. Unlike the third amended complaint, this latest iteration did not include a claim for rescission or seek an accounting; also, Loanvest was no longer a named defendant. In all other relevant respects, the fifth amended complaint alleged the same causes of action against Cresson, PCS, SSF, and South Bay (hereafter "defendants").

In response, defendants raised rescission as an affirmative defense to the fifth amended complaint. PCS also cross-complained for rescission.

C. ***Pre-trial and Trial Proceedings***

Defendants filed a motion for summary adjudication, asserting that all of Madow's claims relating to his loan to PCS failed in light of the rescission. Similarly, defendants argued that PCS should prevail on its cross-complaint as a matter of law. The trial court denied the motion, finding there was a triable issue of fact regarding whether the first acceptance had been made by the correct general partner of PCS. Following the denial of the summary adjudication motion, PCS sought a writ of mandate in this court, which was denied. (*Post Construction Services, LP v. Superior Court* (Nov. 20, 2012, A137066).)

The matter proceeded to a bench trial, with the rescission claim being heard first. At the start of trial, the court explained that it expected: "Mr. Madow will assert in this court proceeding some arguments concerning the obligations of perhaps Mr. Cresson, based on what he has called the 'theory of alter ego liability,' and I will listen to those matters. Those are issues that are equitable in nature and should be heard by the Court. I will listen to those and what everybody has to say on those issues and the import of those arguments."

Defendants claimed that Madow's alter ego claim "would be obviated and no longer at issue if the rescission were to be granted . . . ." After the court clarified that Madow did not agree with this position, Madow stated: "[I]n fact, Your Honor, at an appropriate time, I would like to make some arguments on that very point." The court responded, "That's fine. [¶] I think I was accurate in saying that's an issue I will hear about today. That would go to the issue of the note being executed, and if it is rescinded, the defense says that . . . rescinds all obligations arising from the note, and vicarious alter ego or other theories of third-party liability would have been extinguished . . . [¶] And Mr. Madow will argue to the contrary on that."

Upon taking the stand, Madow explained that he was raising unclean hands as an affirmative defense to the cross-complaint for rescission. He further stated that: "[M]y belief is that any unclean hands I can show transactionally in this loan transaction, I'm

entitled–or should be entitled, I hope, to present to the trier of fact–which would be you, . . . reasons why, based on unclean hands, this particular equitable claim should not succeed." Madow also asserted that he thought it was "also noteworthy, not legally, but on a practical level, that if the Court–and I assume we will get to this argument at some point–if the Court were to agree that even if a rescission were effective, to remove five causes of action from the pending complaint and even if there is a rescission, it would still be an alter ego claim. And, if . . . there is an alter ego claim, and the argument I will make at the appropriate time, then very much the same evidence that the Court would be considering in support of the alter ego claim would also be for the Court's consideration to connect with the unclean hands defense."

Madow further espoused his "concern" regarding "how this trial will proceed, the type of evidence that I believe is relevant to unclean hands and also to alter ego–not the unity of interest part of the alter ego argument, but the fairness and justice part of the alter ego–these are issues which but for a ruling in favor of rescission would be jury decisions. They would be a damage claim, particularly the intentional impairment of security claim. [¶] So that seems, just in terms of the dynamic here, there is a risk–I mean, unless the Court were to say I'm not going to consider all of these other matters in connection with this rescission claim–certainly you could make that ruling, Your Honor. But if you were to accept that, at least as to . . . the unclean hands defense . . . we have a danger here of duplicating the process by first presenting this evidence to Your Honor as trier of fact in connection with the rescission claim. And then, should Your Honor determine that indeed this rescission claim should not survive because the unclean hands defense is good, then seems to me we may have to start over again, presenting the same evidence, but this time to a jury . . . ."

Following the close of evidence, the trial court, noting that the case had been heard within two hours and that no party had requested a statement of decision, ruled that defendants had established mutual rescission by reason of Madow's offer and defendants' prompt acceptance. In so ruling, the court also rejected Madow's claim of unclean hands, explaining as follows: "There's nothing suggested about the process of offer and

acceptance that shows bad conduct by anybody. That all goes to the underlying . . . causes of action, . . . which are extinguished by virtue of Mr. Madow's offer and the acceptance and the principles of vicarious or third-party liability in place of the face obligor, . . . the tort claims derivative therefrom . . . are not related to the completion of the rescission."

D. Settlement and Post-Trial Proceedings

The day after the trial on the rescission claim, the parties appeared in court and announced that they had entered into a settlement agreement regarding the remaining issues, the terms of which were read on the record. The settlement was intended to preserve Madow's right to appeal the rescission decision.

After the parties entered their settlement on the record, Madow filed a document entitled, "Plaintiff's Trial Memorandum re Trial Court's Alter Ego Ruling." In his accompanying declaration, Madow stated that he "had intended to hand-deliver (not serve)" endorsed file copies to defendants and the trial court, but in light of the settlement entered on the afternoon of April 17, 2013, he did not deliver copies to counsel or the court. Madow further alleged that he "did not have the opportunity, prior to [the] trial court's ruling in favor of the defendants on their rescission claim, to submit argument regarding his alter ego claim against Mr. Cresson. Plaintiff believes that he requested argument on this point and that the trial court indicated it would hear argument. Plaintiff understood that the trial court's ruling rejected the unclean hands defense to rescission on the grounds that the rescission agreement constituted a different transaction than the loan transaction and that the unclean hands had to pertain to the same transaction. While Plaintiff believes that the trial court took an unnecessarily restrictive view of the unclean hands doctrine, he will debate the point elsewhere as he has had his day in . . . court on that issue. [¶] Plaintiff did not understand the trial court's ruling to include the rejection of his alter ego claim until he raised the issue of arguing alter ego after the ruling had been made." (Italics omitted.)

On April 24, 2013, the trial court issued a "Notice to the Parties," rejecting Madow's purported trial brief, explaining as follows: "Well after trial, decision, and

settlement, the court received a document purportedly filed April 17, 2013 and received in the mail April 24, 2013. It is entitled 'plaintiff's trial memorandum re trial court's alter ego ruling.' No proof of service on counsel for the parties is attached. The memorandum makes plain that it was filed *after* the court had ruled. No leave of court to file this after[-]trial document was sought or obtained. Instead of striking the late paper, the court filed this notice. [¶] The court believes that a complete record of the proceedings makes clear that the court did not limit plaintiff in his pre-submission presentation. He personally testified without limitation. These matters will be entrusted to a reviewing court, but this notice is filed to take note of the later filing and to express the judgment that matters of which plaintiff complains should be barred by the doctrines of waiver, estoppel, or invited error. Plaintiff's statement concerning his 'understanding' was brief, after the fact, and did not disclose any grounds to reopen the matter which had been decided. Further, plaintiff did not articulate, argue, or present any matter at trial which served to support his later made claim concerning unclean hands or alter ego. In the court's view, based on consideration of the whole record, the parties had their day in court, made presentations until they were finished, and then required the court to decide the matter. The court did so, and plaintiff now complains. In the court's view, the whole record speaks for itself." (Italics added.)

III. DISCUSSION

A. Standard and Scope of Appellate Review

A judgment of a trial court "is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]" (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "The burden of demonstrating error rests on the appellant. [Citation.]" (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.)

"In order to preserve an issue for appeal, a party ordinarily must raise the objection in the trial court." (*In re S.C.* (2006) 138 Cal.App.4th 396, 406.) "The party also must cite to the record showing exactly where the objection was made." (*Ibid.*) As our Supreme Court has explained, "a reviewing court ordinarily will not consider a

challenge to a ruling if an objection could have been but was not made in the trial court." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on other grounds as stated in *In re S.J*. (2008) 167 Cal.App.4th 953, 962.) "The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*In re S.B., supra*, 32 Cal.4th at p. 1293.)

B. Madow's Claims of Error Fail on Appeal

On appeal, Madow contends the trial court erred in denying the right to present his alter ego claim and his unclean hands defense. As we shall explain, these arguments have been forfeited on appeal and otherwise fail on the merits.

1. Forfeiture

To the extent Madow suggests that the court erroneously excluded evidence pertaining to his claim of alter ego liability and defense of unclean hands, he points to no ruling in the record in which the trial court purportedly precluded such evidence. Having reviewed the entire record on appeal, we have discerned no ruling from the court that prevented Madow from presenting evidence regarding his alter ego and unclean hands theories. Rather, the record reflects that the court was open to hearing argument and evidence with respect to both issues. If anything, the record reflects that it was Madow who was concerned about the possibility of presenting duplicative evidence of alter ego liability once before the court and then again before a jury in the event the rescission claim failed. More importantly, the record discloses no attempt by Madow to object to any perceived errors by the trial court.

" 'An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been but was not presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . ." (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1.) " ' "[T]he doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when

such positional changes have an adverse impact on the judicial process. [Citation.] 'The policies underlying preclusion of inconsistent positions are "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings." ' [Citation.]" (*International Engine Parts, Inc. v. Feddersen & Co.* (1998) 64 Cal.App.4th 345, 350.) A party is not permitted to play fast and loose with the administration of justice by deliberately conceding a fact in the trial court and then challenging the evidence supporting that fact on appeal. (See e.g., *Porter v. Golden Eagle Ins. Co.* (1996) 43 Cal.App.4th 1282, 1291 [party may not deliberately stand by without making objection of which he is aware, thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, or avoid, if not].) Likewise, "[u]nder the doctrine of invited error, where a party, by his conduct, induces the commission of an error, he is estopped from asserting it as grounds for reversal." (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166.)

As for forfeiture, " ' "[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." [Citation.] The critical point for preservation of claims on appeal is that the asserted error must have been brought to the attention of the trial court.' [Citations.]" " ' "It is unfair to the trial judge and to the adverse party to take advantage of an alleged error on appeal where it could easily have been corrected at trial. [Citations.]" [Citation.]' [Citation.]" (*DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 177-178.)

Whether denominated estoppel, waiver, forfeiture, or invited error, Madow's conduct in the trial court precludes him from raising the issues here. (*DiPirro v. Bondo Corp., supra,* 153 Cal.App.4th at pp. 177-178.) As the trial court remarked in its post-trial notice, "[T]he parties had their day in court, made presentations until they were finished, and then required the court to decide the matter. The court did so, and plaintiff now complains. In the court's view, the whole record speaks for itself."

2. Failure on Merits

To the extent Madow appears to challenge the trial court's interpretation of the unclean hands defense, this question presents an issue of law, which we review de novo (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 274-275), and conclude it fails on the merits.

The doctrine (defense) of unclean hands is designed to protect the judicial system, not the defendant, by promoting judicial integrity and faith in the system. (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.) The defense is available in both legal and equitable actions. (*Ibid.*) "The misconduct that brings the unclean hands doctrine into play must relate *directly* to the cause at issue. Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice. The determination of the unclean hands defense cannot be distorted into a proceeding to try the general morals of the parties." (*Id.* at p. 979, italics added.) In other words, "the improper conduct must be 'in the particular transaction or connected with the subject matter of the litigation that is a defense.' [Citations.]" (*Brown v. Grimes, supra*, 192 Cal.App.4th at p. 282.)

The transaction at issue in the instant case was whether a mutual rescission was effected by the parties. Mutual rescission involves the formation of a new contract. (*Harriman v. Tetik* (1961) 56 Cal.2d 805, 810.) Offer and acceptance need not be express, but may be implied from the words and acts of the parties. (See *Schertzinger v. Williams* (1961) 198 Cal.App.2d 242, 246.) The mutual promise to forego rights under the rescinded contract is sufficient consideration. (See 1 Witkin, Summary of Cal. (10th ed. 2005) Contracts, § 929, p. 1026, citing *Jura v. Sunshine Biscuits, Inc.* (1953) 118 Cal.App.2d 442, 447.)

On this issue, there was no evidence that defendants acted in an inequitable manner. Rather, Madow asserts that Cresson acted with unclean hands in the underlying loan transaction, by using his affiliated companies as shells to avoid liability and/or by pledging worthless properties to secure the loan. Any unclean hands emanating from the loan transaction did not directly affect or infect the offer and acceptance of the agreement

to mutually rescind the loan transaction. Accordingly, the trial court did not err in refusing to find the doctrine of unclean hands precluded defendants claim of mutual rescission.

C. Consistency Between the Judgment and Settlement

Finally, Madow asserts that the judgment was inconsistent with the terms of the settlement, which preserved his right to challenge the trial court's ruling on the alter ego and unclean hands issues. This contention is without merit. As discussed, Madow failed to preserve his appellate challenges in the trial court. Nothing in the settlement purported to exempt Madow from the appellate requirements of preserving issues for review. Moreover, where applicable we have reviewed Madow's challenges on the merits and conclude they fail. Accordingly, on this record, any purported inconsistency between the judgment and the settlement was harmless. (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801-802.)

IV. DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal.

_____

REARDON, J.

We concur:

_____

RUVOLO, P. J.

_____

RIVERA, J.